STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 31, 2008
v	No. 274834 Wayne Circuit Court
RODNEY MCCOY, Defendant-Appellant.	LC No. 06-005449-01

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of first-degree criminal sexual conduct, MCL 750.520b(1)(c), first-degree home invasion, MCL 750.110a(2), aggravated stalking, MCL 750.411i(2)(a), (3)(a), and domestic violence, MCL 750.81(2). He was sentenced as an habitual offender, second offense, MCL 769.10, to prison terms of 51 months to 10 years for the CSC conviction, 1 to 30 years for the home invasion conviction, 1 to 7-1/2 years for the stalking conviction, and 90 days time served for the domestic violence conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that he is entitled to a new trial because defense counsel was ineffective for failing to call Jerry Brazell and Ida McCoy as defense witnesses.

> To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003) (citations omitted).]

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). "Defendant is entitled to relief only in those instances where his attorney's

omission deprived defendant of a substantial defense." *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record does not show that, at any time before trial, defense counsel was aware that Ida McCoy, defendant's mother, had anything to offer at trial. Further, at the hearing on defendant's motion for a new trial, McCoy testified only that during a conversation the complainant expressed a need for $3,000. The statement was not linked to this case and, therefore, was not shown to be relevant. MRE 401. Therefore, defendant's claim of ineffective assistance of counsel with respect to the failure to call his mother as a defense witness must fail.

The record shows that defense counsel was aware of Brazell and at least some of his proposed testimony because he asked the complainant at trial if she had expressed to Brazell feelings of jealousy over defendant's new girlfriend. However, the record does not show that counsel was aware of anything else that Brazell might offer. Brazell testified that he spoke to "Johnny" and to defendant about what he knew, but declined to speak to a defense investigator. Defense counsel repeatedly stated that he did not know what Brazell had to offer because Brazell would not speak to him or his investigator and defendant never mentioned anything regarding the nature of Brazell's information. Defense counsel "cannot be found ineffective for failing to pursue information that his client neglected to tell him." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Therefore, the record does not support defendant's claim of ineffective assistance of counsel.

Defendant next argues that the trial court erred when it denied his motion for a new trial based on newly discovered evidence, that evidence being Brazell's and McCoy's new testimony regarding statements allegedly made by the complainant. The trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion, but its factual findings are reviewed for clear error. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). An abuse of discretion occurs if the trial court's decision is outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

A new trial may be granted on the basis of newly discovered evidence, *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993), although such motions are not favored. *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985). To obtain a new trial on the basis of newly discovered evidence, the defendant must show that (1) the evidence itself, and not just its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the new evidence would probably cause a different result upon retrial; and (4) the defendant could not, with reasonable diligence, have discovered and produced the new evidence at trial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). Evidence that the complainant's testimony was perjured may warrant a new trial if it meets the above criteria. *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). The defendant has the burden of showing that the evidence is both newly discovered and material. *People v Van Camp*, 356 Mich 593, 602; 97 NW2d 726 (1959).

Defendant failed to establish that his mother's proposed testimony warranted a new trial. McCoy testified that sometime before trial, she advised defendant of her conversation with the complainant. Therefore, the complainant's statement that she could use $3,000 was not newly

discovered. In addition, there is nothing in the record to suggest that defendant could not, with reasonable diligence, have called his mother to testify at trial. Therefore, the trial court did not abuse its discretion in denying defendant's motion to the extent that it was predicated on his mother's proposed testimony.

Defendant also failed to establish that Brazell's proposed testimony warranted a new trial. First and foremost, defendant failed to establish that the evidence was newly discovered. While the record showed that defense counsel was unaware of all of Brazell's proposed testimony, it clearly showed that defendant himself knew the substance of Brazell's proposed testimony. Brazell testified that he met with defendant before trial and told him what he knew. Second, most of what Brazell had to say, which centered on the complainant's jealously of defendant's new girlfriend, did not relate directly to defendant's guilt or innocence; it only affected the complainant's credibility by impeaching her testimony that she was not jealous and thus did not warrant a new trial. *Davis*, *supra* at 516; *People v Boynton*, 46 Mich App 748, 750; 208 NW2d 523 (1973). Third, defendant failed to show that he could not, with reasonable diligence, have discovered and produced Brazell as a witness at trial. As noted, Brazell's testimony was known to defendant, if not defense counsel, before trial and nothing prevented defendant from advising defense counsel what Brazell had said. Further, while Brazell expressed a desire not to get involved and he refused to speak to a defense investigator, nothing prevented defendant from using the subpoena or contempt powers of the court to obtain Brazell's testimony at trial. See MCL 600.1701(i); MCL 767.32; MCL 767.33. Therefore, the trial court did not abuse its discretion in denying defendant's motion to the extent that it was predicated on Brazell's proposed testimony.

We affirm.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto